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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. [redacted]

SPENCER M. ANDERSON, ET AL., AND ARTHUR MORGAN, ET AL., *Petitioners*,

v.

PANAMA CANAL COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

SPENCER M. ANDERSON, ET AL., AND ARTHUR MORGAN, ET AL., *Petitioners*,

v.

PANAMA CANAL COMPANY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 9, 1963, reversing the judgment of the District Court for the Canal Zone.

Opinions Below

The opinion of the Court of Appeals is reported at 312 F.2d 98 and is printed in Appendix B at pp. 13-20.

The opinion of the United States District Court for the Canal Zone is reported at 194 Fed. Supp. 765 and is set out at R. 36.[1]

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[1] References preceded by "R." are to the Record as printed for use of the Court below, ten copies of which have been filed here.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit (Appendix B, p. 21) was entered January 9, 1963. A timely petition for rehearing was filed and was denied on February 11, 1963 (Appendix B, p. 22). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether petitioners are subject to Section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C.A. 673(c), and entitled to have their regular hours of labor computed in accordance with the requirements of that statute.

2. Whether the Court should review and pass upon the compensability of duties performed by petitioners in traveling on respondent's waterborne conveyances, which the District Court following decisions of this Court, clearly found to constitute regular hours of labor.

3. Whether the Court of Appeals should have remanded the case to the District Court for consideration of petitioners' entitlement to compensation under Section 248 of Title 2, Canal Zone Code, since the District Court had held petitioners subject not only to Section 23 of the Act of March 28, 1934, but also to Section 248 of Title 2, Canal Zone Code.

Statutes Involved

The statutory provisions involved are Section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C.A. 673c, Sections 102(c), 102(d) and 606 of the Federal Employees Pay Act of 1945, 59 Stat. 295, 5 U.S.C.A. 902c, 902d and 946, and Section 248 of Title 2 of the Canal Zone Code. They are printed in Appendix A infra, pp. 11, 12.

Statement

This action was initiated in the United States District Court for the Canal Zone on January 5, 1959 (R. 1, 7) by 171 employees working at hourly rates of pay on dredges of respondent Company. They seek to recover compensation under the provisions of the Thomas Amendment, Section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C.A. 673(c) and Section 248, Title 2 of the Canal Zone Code (R. 5, 8, 9, 32, 37) for the ten minutes to two hours which they spend each day in traveling over water to and from respondent's dredges in conveyances owned, operated and controlled by respondent.

The jurisdiction of the District Court was invoked under Section 132, Title 4 (Section 141, Title 3, 1962 Revision) of the Canal Zone Code. Respondent contends: first, that petitioners are not subject to the Thomas Amendment because they are "vessel" employees under Section 102i and 606 of the Federal Employees Pay Act of 1945 (59 Stat. 295, 5 U.S.C.A. 902d and 946) and, second, that their water-borne travel does not constitute regular hours of labor.

By stipulation the trial in the District Court was limited to the question of liability (R. 37, 69).

The District Court held that petitioners are subject to the Thomas Amendment and Section 248, Title 2 of the Canal Zone Code (App. B 14), that their over-water travel has all of the indicia of work, that it should be included in computing their regular hours of labor and that they are entitled to be compensated for such work. Although the District Court was convinced that its opinion on the issues was "legally sound and correct" (R. 101), it nevertheless certified the two questions of the applicability of the Thomas Amendment and the compensability of their over-water travel, to the Court of Appeals for the Fifth Circuit under the

statutory provision for interlocutory appeals, 28 U.S.C.A. 1292(b). (R. 101-103).

The Court below, by a two to-one decision (App. B 13-17) with a strong dissent from Judge Rives (App. B 18-20) reversed the judgment of the District Court, and held that the Thomas Amendment did not protect petitioners because it had been impliedly repealed as to them by Sections 902d and 606 of the 1945 Employees Pay Act (5 U.S.C.A. 902d and 946). The Court of Appeals did not pass upon the compensability of the over-water travel of petitioners, although the dissenting Judge stated that he agreed in other respects with the opinion of the District Court. It also failed to pass upon the District Court's ruling that petitioners were also subject to Section 248, Title 2, of the Canal Zone Code.

Reasons for Granting the Writ

1. The resolution of the questions involved here is extremely important to the implementation of our national labor policy of a 40-hour workweek which has been established over the years by the laws enacted for the benefit of the workers of this country, including Federal employees.

In *Sinclair Refining Co.* v. *Atkinson*, (1962) 370 U.S. 195, this Court was concerned over the impact of subsequent legislation upon Section 4 of the earlier Norris-LaGuardia Act (29 U.S.C.A. 104). Similarly here, the effect of a subsequent Act (Federal Employees Pay Act of 1945) on an earlier Act, the Thomas Amendment, is in issue. The Thomas Amendment constitutes an important segment of our national labor policy, since it was the first significant legislation establishing a forty-hour workweek. It was followed in 1936 by the Walsh-Healey Public Contracts Act (49 Stat. 2036; 41 U.S.C.A. 35-45) and in 1938 by the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C.A. 201-219).

These later acts extended the scope of the forty-hour work week to virtually all employees.

The basic effect of the decision of the lower Court is to remove large numbers of employees from the protection provided for them by the Thomas Amendment of receiving true time and one-half overtime for working beyond the nationally established forty-hour workweek. Moreover, though incongruous, this has been accomplished by applying provisions of the Federal Employees Pay Act of 1945, a statute enacted for remedial purposes. The majority decision of the Court below departs from the firm national policy of the forty-hour workweek and will deprive many employees of true time and one-half overtime compensation.

2. In *United States v. Townsley*, 323 U.S. 557, 559 (1945), this Court held that employees of the Panama Canal (including some of the particular petitioners here (R. 93, 94)) who were employed on dredges were engaged in the "trades and occupations" within the meaning of the Thomas Amendment (Sec. 23 of the Act of March 28, 1934, 5 U.S.C.A. 673c) and thus entitled to the overtime compensation provided thereunder. Also see *Hearne v. U.S.*, 107 Ct. Cls. 335, Cert. denied, 331 U.S. 858.

Soon thereafter, in June 1945, the Congress passed the Federal Employees Pay Act of 1945 (59 Stat. 296), which included Sections 102d and 606 (5 U.S.C.A. 902d, 946) and Section 203 (which later became Section 205) (5 U.S.C.A. 913). The Court below relied on Sections 102d and 606 in denying petitioners' claim. However, House of Representatives Report No. 726 on H.R. 3393, 79th Congress, 1st Session, which later became the Federal Employees Pay Act of 1945, made it crystal clear that in enacting these provisions of law, the Congress had no intent of disturbing the requirements of the earlier Thomas Amendment (R. 46, 47).

Indeed, the intent of preserving the benefits of that statutory provision for wage-schedule employees, such as petitioners, was specifically stated (R. 47).

Again, as recently as 1958, the Congress (in Section 17(2) of Public Law 85-550, 72 Stat. 405) categorically preserved the requirements of the Thomas Amendment for employees of respondent (R. 55, 56). In that Act a new wage system was provided for Canal Zone employees and it explicitly provided that nothing in the new Act should affect the applicability of the Thomas Amendment to employees within its scope. Accordingly, we submit that the Circuit Court's denial of petitioners' claims conflicts with or ignores not only this Court's decision in the *Tonjisha* case, but also the repeated expressions of the Congress with respect to the applicability of the Thomas Amendment to petitioners.

3. The Circuit Court erred in holding that Sections 602d and 606 of the Federal Employees Pay Act applied to petitioners and has thus denied the benefits of the Thomas Amendment to a large group of Federal employees. As enacted, Section 606 permitted "vessel" employees of the Panama Railroad Company to be compensated in accordance with wage practices in the maritime industry. But the petitioners herein were then employed by another agency, the Panama Canal, and as a matter of fact have never been employed by the Panama Railroad Company.

The Comptroller General in 31 Comp. Gen. 87 (Sept. 12, 1951), after petitioners had been transferred to the new agency, affirmed the view respondent itself had expressed

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* The Act of September 26, 1950, ch. 1049, 64 Stat. 1038, created a new Government agency, the Panama Canal Company, and on July 1, 1951, petitioners were transferred to employment by this new agency. References to statutes to the Panama Canal and the Panama Railroad Company were changed to Panama Canal Company with no expression of intent by the Congress that the applicability of the Thomas Amendment to petitioners was affected. To the contrary, Public Law 85-550, 72 Stat. 405, as late as 1958, reaffirmed its protection to Canal Zone employees.

in its letter of August 13, 1951, that Section 102d of the 1945 Pay Act (5 U.S.C.A. 902d) was enacted to apply to employees on ships operated by the Panama Railroad Company.[1] The scope of that statutory provision was no broader in 1951, we submit, than when it was passed in 1945 and did not serve in 1951 to bring within its terms employees, such as petitioners, who had never been employed on vessels of the Panama Railroad Company (R. 48). This intent is further evidenced by the complete exemption from the provision of Section 606 of the Federal Employees Pay Act of 1945 provided by Section 102c (5 U.S.C.A. 902c) for employees whose basic compensation is fixed and adjusted by wage boards or similar administrative authorities. (Such employees are clearly subject to the Thomas Amendment (R. 53, 54, 78). *U.S. v. Townsley*, supra, *Hearns v. U.S.*, supra.) Inasmuch as petitioners fall squarely within the plain language of Section 102c (5 U.S.C.A. 902c), they would not be subject to any provisions of Chapter 18 of Title 5 other than Sections 203 (5 U.S.C.A. 913) which applies only to monthly and per annum employees and 607 (5 U.S.C.A. 947) which has been repealed.

4. The Court of Appeals erroneously found that a repugnancy exists between the requirements of the Thomas Amendment and Sections 102d and 606 of the 1945 Pay Act. The Thomas Amendment establishes a forty-hour week and requires payment of time and one-half overtime compensation for hours worked in excess of that standard. Section 606 *permits* vessel employees to be compensated in accordance with wage practices in the maritime industry.

It is perfectly clear that no prohibition exists in Sections 102d or 606 preventing a forty-hour week or the payment

[1] The Panama Railroad Company at that time operated a shipping line between the Canal Zone and the United States and the Commission's report relied that it was to "vessel" employees on this shipping line that sections 102d and 606 were intended to apply.

of overtime for all hours of work, including the water-borne travel involved here, as required by the Thomas Amendment. Indeed, respondent has computed such over-water travel in the forty-hour workweek and paid for same for others of its vessel employees, namely, those in its Navigation Division working on tugs (R. 41, 85; App. B 19).

This Court and other Courts have specifically ruled that where there may be some overlapping of two or more compensation statutes, both should apply unless "one Act makes it impossible to comply with the other." *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519-520. Also see *Walling v. Patton Tulley Transp. Co.*, 134 F. 2d 945, 948. There is certainly no barrier here to the application of both statutory provisions. For, despite respondent's contentions with regard to Section 606, petitioners receive benefits conferred by the Federal Employees Compensation Act (39 Stat. 742; 63 Stat. 854; 5 U.S.C.A. 751 et seq.), the Civil Service Retirement Act (63 Stat. 475, 5 U.S.C.A. 740), the Federal Unemployment Compensation Act (68 Stat. 1130), and the Government Employees Group Life Insurance Act (68 Stat. 736, 5 U.S.C.A. 2091). None of such benefits are required by wage practices in the maritime industry under Section 606.

5. The majority of the lower Court also held that the Thomas Amendment was impliedly superseded or repealed by the later provisions of Sections 102d and 606 of the 1945 Pay Act because they were specific and the Thomas Amendment was general. The dissenting opinion of Judge Rives adequately and persuasively demolishes this view (App. B 18-20). Without question, the variety of occupations on vessels is less specific than the limited group of trades and occupations whose compensation is fixed by wage boards or other wage-fixing authorities. Significant also is the limited area of overtime dealt with by the Thomas Amendment,

while Sections 102d and 606 cover the entire gamut of compensation pay and practices in the whole maritime industry.

The cardinal rule of statutory construction is against repeals by implication and in favor of giving effect to each of two statutes when that can reasonably be done. *Sinclair Refining Co.* v. *Atkinson*, (1962), 370 U.S. 195, 8 L. ed. 2d 440, 446; *F.T.C.* v. *A.P.W. Paper Co., Inc.*, 328 U.S. 193, 202, 203; *U.S.* v. *Borden Co.*, 308 U.S. 188, 198, 199; *Helvering* v. *Bliss*, 293 U.S. 144, 151; *General Motors Acceptance Corp.* v. *U.S.*, 286 U.S. 49, 62; *Posadas* v. *National City Bank*, 296 U.S. 497, 504. It is evident that here there exists no clear and manifest intent by the Congress to repeal the Thomas Amendment in its applicability to petitioners. *Red Rock* v. *Henry*, 106 U.S. 596, 601; 602.

6. The District Court, relying on the decision of this Court in *Tennessee Coal, Iron & Ry. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, held that the over-water travel performed by petitioners for respondent has all of the indicia of work and is compensable (R. 38-41, 79-85). Since petitioners are not subject to the Portal-to-Portal Act, 61 Stat. 84, 5 U.S.C.A. 251-262, the District Court's determination fully accords with authoritative rulings. The Circuit Court failed to pass on this issue. Petitioners are, and have for many years, been required to perform these duties without compensation, while their fellow employees working on respondent's tugboats are paid for similar, if not identical, duties (R. 41, 85). It is highly desirable that the Court, in justice to petitioners, review and determine this issue.

7. The Court of Appeals found that the District Court held petitioners subject not only to the Thomas Amendment, but also to Section 248 of Title 2 of the Canal Zone Code. (App. B p. 14). The question of petitioners' entitlement to compensation under this statutory provision was not

certified to the Court of Appeals under 28 U.S.C.A. 1292b (R. 101). Consequently, in view of its adverse judgment with respect to the applicability of the Thomas Amendment, it was error for the Circuit Court not to have remanded the case to the District Court for further proceedings under Section 248 of Title 2 of the Canal Zone Code. This constitutes a denial of due process.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 7, 1963

APPENDIX A

Statutes Involved

1. Section 23 of the Act of March 28, 1934, popularly known as the Thomas Amendment, is as follows:

> "The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be re-established and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: Provided, that the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half." 5 U.S.C.A. Section 673c.

2. Sections 102(c), 102(d) and 606 (5 U.S.C.A. 902c, 902d, 946) of the Federal Employees Pay Act of 1945, are as follows:

> Section 102c: "Sections 84, 663, 667, 672a, 673 of this title, and this chapter, except sections 913 and 947 of this title, shall not apply to employees whose basic compensation is fixed and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose." 5 U.S.C.A. 902c.
>
> Section 102d: "Sections 84, 663, 667, 672a, 673 of this title, and this chapter except sections 946 and 947 of this title, shall not apply to employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, to vessel employees of the Coast and Geodetic Survey, to vessel employees of the Department of the Interior, or to vessel employees of the Panama Canal Company." 5 U.S.C.A. 902d.

Section 606: "Vessel Employees. Employees of the Transportation Corps of the Army of the United States on vesels operated by the United States, vessel employees of the Coast and Geodetic Survey, vessel employees of the Department of the Interior, and vessel employees of the Panama Canal Company, may be compensated in accordance with the wage practices of the maritime industry." 5 U.S.C.A. 946.

3. Section 248(e) of Title 2, Canal Zone Code is as follows:

"The corporation (Panama Canal Company) shall have and may exercise the following general powers, in addition to those elsewhere conferred in this article:

. . . . . .

(e) May appoint such officers, agents, attorneys, and employees as may be necessary for the conduct of the business of the corporation, define their authority and duties, fix their compensation, delegate to them such of the powers of the corporation as may be necessary, require that such of them as it may designate be bonded, and fix the penalties and pay the premiums of such bonds. Persons employed by the corporation whose compensation is paid on any basis other than a per annum basis shall not be included in making computations pursuant to the provisions of section 607 (Repealed 64 Stat. 843) of the Federal Employees Pay Act of 1945. The provisions of section 82 of this title, as amended, shall apply to the corporation and to its officers and employees. Canal Zone Code Section 248, 48 Stat. 1122, 62 Stat. 1076, 64 Stat. 1041."

APPENDIX B

UNITED STATES COURT OF APPEALS—FOR THE FIFTH CIRCUIT

No. 19116

PANAMA CANAL COMPANY, *Appellant*,

versus

SPENCER M. ANDERSON, ET AL., AND ARTHUR MORGAN, ET AL., *Appellees*.

Appeal from the United States District Court for the District of the Canal Zone

(January 9, 1963)

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

JONES, Circuit Judge: The Panama Railroad Company was incorporated in New York in 1849. From 1905 until 1949, when it was dissolved, all of its stock was owned by the United States. The appellant corporation, Panama Canal Company, herein generally referred to as the Company, was created by the Panama Canal Company Act which the Congress enacted in 1948 and which is now Sections 245 to 258 of the Canal Zone Code. The Company is the successor to the Panama Railroad Company. Its stock, like that of its predecessor, is wholly owned by the United States. The appellees, 171 in number, are or have been employees of the Company, working at hourly rates of pay aboard the dredges, tugs, launches and perhaps other floating equipment of the Company. These employees, for the most part, travel from some pick-up point in the neighborhood of their residence to a dock or landing. All of the appellee-employees are transported by the Company on its launches to the equipment where they are employed. The time of water-borne travel of the employees depends, of course, upon the distance from dock or landing to dredge or other equipment, and ranges from ten minutes to two hours. The employees are compen-

sated at an hourly pay rate for weekly pay periods of forty hours with time and a half for overtime. The time for which wages are paid includes only that spent in the performance of the duties of the employees on the equipment to which they have been assigned. It does not include any time spent in traveling to or from the equipment over either water or land. The appellees brought suit in the District Court of the Canal Zone claiming that they were entitled to recover additional compensation for their travel time. The court held that the time spent in waterborne travel was compensable but the time spent in overland travel was not. The court, being anxious to avoid computing the additional wages of the multitude of plaintiffs in the event of error in its determination that waterborne travel time was work time for which wages were payable, certified the question to this Court under the statutory provision for interlocutory appeals. 28 U.S.C.A. § 1292(b).

The district court made a determination that the employee-appellees are subject to the so-called Thomas Amendment[1] and to Section 248 of Title 2, Canal Zone Code, as amended.[2] It was held that the appellees are not

[1] "The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be re-established and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: Provided, that the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half." 5 U.S.C.A. § 673 c.

[2] "The corporation [Panama Canal Company] shall have and may exercise the following general powers, in addition to those elsewhere conferred in this article:

(e) May appoint such officers, agents, attorneys and employees as may be necessary for the conduct of the business of the corporation, define their authority and duties, fix their compensation, delegate to them such of the powers of the corporation as may be necessary, require that such of them as it may designate be bonded, and fix the penalties and pay the premiums of such bonds. Persons employed by the corporation whose compensation is paid on any basis other than a

subject to sections 162 (d),[3] 205,[4] or 607[5] of the Federal Employees Pay Act as amended.

The questions, as presented by the interlocutory appeal and as framed by the district court, are:

(a) Are the plaintiffs as a group, or are any of them individually, subject to section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C.A. 673c?

(b) Does the time spent by plaintiffs in traveling by means of defendant's water-borne conveyances over the Panama Canal and contiguous waters (under the state of facts found by the district court in its opinion of April 26,

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per annum basis shall not be included in making computations pursuant to the provisions of section 607 [Repealed 64 Stat. 843] of the Federal Employees Pay Act of 1945. The provisions of section 82 of this title, as amended, shall apply to the corporation and to its officers and employees." Canal Zone Code § 248, 48 Stat. 1122, 62 Stat. 1076, 64 Stat. 1041.

[3] "This Act, except sections 606 and 607, shall not apply to employees of the Transportation Corps of the Army of the United States or vessels operated by the United States, to vessel employees of the Coast and Geodetic Survey, to vessel employees of the Department of the Interior, or to vessel employees of the Panama Canal Company." 5 U.S.C.A. § 902(d).

[4] "Employees whose basic rate of compensation is fixed on an annual or monthly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose shall be entitled to overtime pay in accordance with the provisions of section 23 of the Act of March 28, 1934 [5 U.S.C.A. § 673c]. The rate of compensation for each hour of overtime employment of any such employee shall be computed as follows:

"(a) If the basic rate of compensation of the employee is fixed on an annual basis, divide such basic rate of compensation by two thousand and eighty and multiply the quotient by one and one-half; and

"(b) If the basic rate of compensation of the employee is fixed on a monthly basis, multiply such basic rate of compensation by twelve to derive a basic annual rate of compensation, divide such basic annual rate of compensation by two thousand and eighty, and multiply the quotient by one and one-half." 5 U.S.C.A. § 913.

[5] "Employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, vessel employees of the Coast and Geodetic Survey, vessel employees of the Department of the Interior and vessel employees of the Panama Canal Company, may be compensated in accordance with the wage practices of the maritime industry." 5 U.S.C.A. § 946.

1961) constitute regular hours of labor within the meaning of Section 23 of the Act of March 23, 1934; 48 Stat. 522, 5 U.S.C.A. § 673c?

More briefly stated, the question which this Court has undertaken to answer is whether the Thomas Amendment requires that the appellees be paid for their over-water travel time as constituting regular hours of labor.

The question presented is one of statutory construction. Where there are two or more statutes dealing with the same subject they are to be read in pari materia and harmonized, if possible. If there is any repugnancy between them the specific or particular statute will control over and supersede a general statute even though the general measure be more recently enacted. Sutherland, Statutory Construction 3rd Ed. 541, § 5204, 82 C.J.S. 839, Statutes § 369; *Bulova Watch Company v. United States*, 365 U.S. 753, 81 S. Ct. 864, 6 L. Ed. 2d 72; *Euzor v. United States*, 5th Cir. 1959, 262 F. 2d 172, cert. den. 359 U.S. 953, 79 S. Ct. 740, 3 L. Ed. 2d 761; *Price v. United States*, 5th Cir. 1934, 74 F. 2d 120, cert. den. 294 U.S. 720, 55 S. Ct. 549, 79 L. Ed. 1252, reh. den. 295 U.S. 767, 55 S. Ct. 643, 79 L. Ed. 1708. Section 606; 5 U.S.C.A. § 946, supra, is a specific statutory provision dealing with particular employee groups including vessel employees of the Panama Canal Company. If, as seems to be established, the appellees are vessel employees of the Panama Canal Company, and if, as seems also to have been established, it is not the wage practice in the maritime industry to compensate vessel employees for the time spent in over-water travel to and from the vessel on which they are employed, there is, in our opinion, a repugnancy between the specific terms of Section 606 and the general provisions of the Thomas Amendment and the canons of construction give the precedence to the specific statute.

The district court rejected the view that the specific legislation governed and, in its opinion, said:

> "Prior to June 30, 1951, [when much of the functions and many of the employees of the Canal Zone government were taken over by the Panama

> Canal Company] plaintiffs were as has been stated, employees not of the 'Company' but of the unincorporated entity, the Panama Canal, and Congress in passing specific legislation [in 1945] for 'vessel employees' of the Company could not have had them in mind." 194 F. Supp. 765, 786.

To us it would appear that Congress, in enacting the specific provisions relating to vessel employees, would not have intended to require different wage treatment for employees doing identical work under the same circumstances and conditions dependent upon whether the particular workman had been hired before or after the vessel employee statute was enacted. The adherence to this view requires us to reject the construction placed upon the enactments by the district court.

The appellant urges that the appellees are not wage-board employees under the Thomas Amendment and hence are not entitled to its benefits. It contends that the Thomas Amendment is applicable only to employees of corporate agencies of the United States whose compensation is fixed on an annual or monthly basis and does not apply to such employees as the appellees who are paid by the hour. Even if the Thomas Amendment applies to the appellees, it is said by the appellant that we must reverse the district court and sustain the administrative finding of the appellant that over-water travel time does not constitute hours of labor within the meaning of the Amendment. This, it says, follows because the administrative finding cannot be overturned in the absence of a finding of an abuse of discretion; and because, in any event, the travel to the job site is not contemplated or included within "hours of labor". Since we have decided that the district court's determination must be reversed upon a more basic and fundamental principle of statutory construction, these questions do not require our consideration.

The judgment of the district court is

Reversed.

RIVES, Circuit Judge, Dissenting:

I have difficulty with the majority's easy classification of the Thomas Amendment as a "general measure" and Section 606, 5 U.S.C.A. § 946, as the controlling "specific or particular statute." To me that differentiation seems to depend on the subjective point of view as to which matter appears more important to each judge. True, Section 606 deals particularly with the compensation of "vessel employees of the Panama Canal Company." That, however, includes both those engaged in "the several trades and occupations" and also others, such as ship's doctors, professionals, administrative and clerical employees. On the other hand, the Thomas Amendment relates to the compensation of only those employees who are engaged in "the several trades and occupations."[1] Of more importance, the Thomas Amendment deals specifically with the subject of overtime for more than forty hours per week of regular hours of labor, which can possibly be covered by Section 606 only by reference to one of "the wage practices of the maritime industry."

The classification of one statute as a "general measure" and the other as a "specific or particular statute," becomes unnecessary if we agree with the following reasoning of the able and careful district judge:

> ". . . I find nothing repugnant in the application of both the Thomas Amendment and Section 102(d) and 606 of the 1945 Pay Act to plaintiffs. In the first they are given an overtime guarantee that is general

[1] In Townsley v. United States, 101 Ct. Cls. 237, the U.S. Court of Claims held that employees of the Panama Canal employed on dredges were engaged in one of the "trades and occupations" within the meaning of the Thomas Amendment. The Supreme Court agreed in United States v. Townsley, 323 U.S. 557, 559. Mr. Justice Roberts, speaking for the Court, with reference to the dredge employee in that case, stated:

> "The Court of Claims held that he was engaged in one of the 'trades and occupations' whose compensation is set by wage boards or other wage-fixing authorities' covered by the Act. We think this conclusion is right and do not understand the petitioner now to contest it."

to all employees fitting the terms of the Act and in the other they 'may' be compensated in accordance with wage practices of the maritime industry. It does not necessarily follow that an act setting up the right of defendant to follow a program of payment in accordance with that utilized at sea should deprive plaintiffs of the benefits of an over all premium pay statute under which they qualify."

That reasoning seems sound and in accord with the cardinal rule against repeals by implication and in favor of giving effect to each of two statutes when that can reasonably be done. In dealing with problems much like that confronting us, the Sixth Circuit found no difficulty in reconciling the Eight-hour Law Amendment with the Fair Labor Standards Act,[2] and the Supreme Court held that the Walsh-Healey Act did not preclude the application of the Fair Labor Standards Act to employees under the same contract.[3] That the same principle is applicable to the present case is demonstrated by the district court's finding of fact No. 27:

"27. Defendant has acknowledged as hours of work and paid for travel performed by tugboat employees in its Navigation Division. During the past six or seven years more than 100 employees in defendant's Navigation Division have been paid for their travel time. The water-borne conveyances which transport Navigation Division employees during their travel are of the same type as those used by defendant to transport plaintiffs. The travel performed by the Navigation Division employees is similar, if not identical to that performed by other employees on defendant's floating equipment, including plaintiffs in its Dredging Division."

---

[2] Walling v. Patton-Tulley Transportation Co., 6 Cir., 1943, 134 F. 2d 945, 948.

[3] Powell v. U. S. Cartridge Co., 1950, 339 U.S. 497, 519, 520.

In other respects I agree with the able and thorough opinion of the district court, and must therefore respectfully dissent.

A true copy

Test: Edward W. Wadsworth

Clerk, U.S. Court of Appeals, Fifth Circuit

By Clara R. James
Deputy

February 27, 1963.

New Orleans, Louisiana

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,116

D. C. Docket No 4784 and 4797 Civil

PANAMA CANAL COMPANY, *Appellant*,

versus

SPENCER M. ANDERSON, ET AL., AND ARTHUR MORGAN, ET AL., *Appellees*.

Appeal from the United States District Court for the District of the Canal Zone.

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of the Canal Zone, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed. "Rives, Circuit Judge, Dissents"

January 9, 1963.

Issued as Mandate:

[464] - Jones

(February 11, 1963)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19,116

PANAMA CANAL COMPANY, *Appellant*,

versus

SPENCER M. ANDERSON, ET AL., AND ARTHUR MORGAN, ET AL., *Appellees*.

Appeal from the United States District Court for the District of the Canal Zone.

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED That the petition for rehearing in the above numbered and entitled cause be, and the same is hereby DENIED.

RIVES, Circuit Judge, Dissents.

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No. [redacted] 117

In the Supreme Court of the United States

OCTOBER TERM, 1962

SPENCER M. ANDERSON, ET AL., AND ARTHUR MORGAN, ET AL., PETITIONERS

v.

PANAMA CANAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1078

SPENCER M. ANDERSON, ET AL., AND ARTHUR MORGAN, ET AL., PETITIONERS

v.

PANAMA CANAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. 13-20)[1] is reported at 312 F. 2d 98. The opinion of the United States District Court for the District of the Canal Zone (R. 36-60)[2] is reported at 191 F. Supp. 765.

[1] "Pet." refers to the petition for certiorari in this case.

[2] "R." refers to the record as printed for the use of the court below which has been filed by the petitioners.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1963 (Pet. 21). Petition for rehearing *en banc* was denied by the Court of Appeals on February 11, 1963 (Pet. 22). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, employed as officers, operators, or members of crews of vessels of the Panama Canal Company, a corporate agency of the United States, are entitled to wage practices accorded to "wage-board" employees under the provisions of Section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C. § 673c, notwithstanding Section 606 of the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. § 946, which provides that "vessel employees of the Panama Canal Company may be compensated in accordance with the wage practices of the maritime industry."

2. Whether petitioners are entitled to compensation for time spent in traveling, aboard respondent's water-borne conveyances, to and from the vessels of respondent upon which they are employed, based upon their contention that such travel time represents "hours of labor" within the meaning of Section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C. § 673c, even though petitioners' counterparts in the private maritime industry are not compensated for such travel time.

3. Whether petitioners have a statutory right to the travel time sought by them under Section 248 of Title 2, Canal Zone Code (1934), which simply, in effect, authorizes the respondent to appoint its employees, define their authority and duties, and fix their compensation.

4. Whether petitioners are entitled to assert a right under Section 248 of Title 2, Canal Zone Code (1934), having failed to raise the question upon appeal to the court below.

5. Whether the decision is sustainable on other grounds urged by respondent in the court below.

STATUTES INVOLVED

1. The pertinent provisions of Section 23 of the Act of March 28, 1934 (commonly known as the Thomas Amendment), 48 Stat. 522, 5 U.S.C. § 673c, are as follows:

> The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not be more than forty per week, and all overtime shall be compensated for at the rate of not less than time and one half.[2]

2. The pertinent provisions of the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. § 901-48, are as follows:

COVERAGE

> SEC. 101. (a) [5 U.S.C. § 901]. Subject to the exemptions specified in section 102 of this Act, titles II, III, and IV of this Act shall apply (1) to all civilian officers and employees in or under the executive branch of the Government, including Government-owned or controlled corporations, and in or under the District of Columbia municipal government, . . .

[2] This paragraph of Section 23 is set out as the law read when the case was decided by the District Court on April 21, 1961. Its subsequent amendment by Act of August 31, 1962, § 201, 76 Stat. 360, is not material to any of the issues before this Court.

EXEMPTIONS

SEC. 102. [5 U.S.C. § 902] * * *

(b) This Act, except section 607, shall not apply to . . . (2) employees outside the continental limits of the United States, including those in Alaska, who are paid in accordance with local native prevailing wage rates for the area in which employed. . . .

(c) This Act, except sections 205 and 607, shall not apply to employees whose basic compensation is fixed and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose.

(d) This Act, except sections 606 and 607, shall not apply to employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, to vessel employees of the Coast and Geodetic Survey, to vessel employees of the Department of the Interior, or to vessel employees of the Panama Canal Company.

* * * * *

WAGE BOARD EMPLOYEES

SEC. 205. [formerly Sec. 203, 5 U.S.C. § 913] Employees whose basic rate of compensation is fixed on an annual or monthly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose shall be entitled to overtime pay in accordance with the provisions of section 23 of the Act of March 28, 1934 (U.S.C., 1940 edition, title 5, sec. 673c). . . .

* * * * *

VESSEL EMPLOYEES

SEC. 606. [5 U.S.C. § 946] Employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, vessel

employees of the Coast and Geodetic Survey, vessel employees of the Department of the Interior and vessel employees of the Panama Canal Company, may be compensated in accordance with the wage practices of the maritime industry.

3. The pertinent provisions of the Canal Zone Code, approved June 19, 1934,[4] 48 Stat. 1122, as amended, are as follows:

TITLE 2

Section 248. [As added by Act June 29, 1948, c. 707, sec. 2, 62 Stat. 1076, and amended September 26, 1950, c. 1049, sec. 8, 64 Stat. 1041.]

GENERAL POWERS OF CORPORATION.—The corporation shall have and may exercise the following general powers, in addition to those elsewhere conferred in this article:

* * * * * *

(e) May appoint such officers, agents, attorneys, and employees as may be necessary for the conduct of the business of the corporation, define their authority and duties, fix their compensation, delegate to them such of the powers of the corporation as may be necessary, require that such of them as it may designate be bonded, and fix the penalties and pay the premiums of such bonds. . . . The provisions of section 82 of this title, as amended, shall apply to the corporation and to its officers and employees.

* * * * * *

Section 249. [As added by Act of June 29, 1948, c. 706, sec. 2, 62 Stat. 1076, and amended Septem-

[4] The 1934 Canal Zone Code was repealed and a new Code enacted by Public Law 87-845, approved October 18, 1962, 76A Stat. 1. Sections 248 and 249 of Title 2, set out here, appear in the 1962 Code as Sections 121 and 66, respectively, of Title 2, 76A Stat. 15, 11.

ber 26, 1950, secs. 2(b), 9, 64 Stat. 1038, 1042.]

SPECIFIC POWERS OF CORPORATION.—Subject to the provisions of the Government Corporation Control Act, the corporation shall have and may exercise the following specific powers, in addition to those elsewhere conferred in this article:

(a) May maintain and operate the Panama Canal.

* * * * *

(c) May construct or acquire vessels, and operate the same for transportation of passengers or freight and for other purposes.

(d) May construct or acquire, establish, maintain, and operate docks, wharves, piers, harbor terminal facilities, shops, yards, marine railways, salvage and towing facilities, fuel-handling facilities, motor transportation facilities, power systems, water systems, . . .

* * * * * *

4. The pertinent provisions of the Classification Act of 1949, 63 Stat. 954, as amended, 5 U.S.C. §§ 1071-153, are as follows:

SEC. 202. [5 U.S.C. § 1082] This Act (except title XII) shall not apply to—

* * * * *

(8) officers and members of crews of vessels, whose compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry;

* * * * *

STATEMENT

This litigation, instituted as two civil actions which were consolidated for trial and subsequent appeal, was brought against the Panama Canal Company by the 171

petitioners who are, or have been, officers, operators and members of the crews of dredges and other vessels operated by the respondent in Canal Zone waters (R. 63-65). Respondent is a wholly-owned corporate agency and instrumentality of the United States charged with the operation and maintenance of the Panama Canal as an interoceanic waterway and with the conduct of its incidental business activities (R. 61, 62).

The jurisdiction of the District Court for the District of the Canal Zone was invoked because the question is one involving laws of the United States applicable to the Canal Zone. 7 C.Z.C. § 23g (1934); 3 C.Z.C. § 141, 76A Stat. 56 (1962).

Petitioners claim additional compensation for time spent by them, before and after regularly-scheduled work shifts, in traveling to and from their duty stations aboard dredges and other vessels of the respondent's Dredging Division. Such travel is performed by means of land and water-borne conveyances furnished and operated by respondent. The claim was advanced as a matter of statutory right under Section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C. § 673c (commonly known as the Thomas Amendment), on the theory that the travel time in question constitutes regular *hours of labor* within the meaning of that law.

It is established that petitioners are paid at hourly rates for a regular workweek of forty hours with overtime work compensated at the rate of time and one-half. Only such time as is spent on duty aboard the vessels to which th employees are assigned is treated as compensable. The time spent in traveling over water and land to and from the duty station has never been treated as work time by the respondent. The means of travel has been furnished the petitioners by the Company free of cost. (Pet. 13, 14; R. 61, 69, 70, 71, 75-76)

The District Court held that the Thomas Amendment

applies to these employees. It further held that the travel overland to and from the vessels in the Company's vehicles is *not work* but that the remainder of the trip over water constitutes *hours of labor* under the Amendment and is compensable work time.

Inasmuch as the issue of damages had not been tried, the District Court, upon motion of the Company, certified that its interlocutory order involved two controlling questions of law as to which there was substantial ground for difference of opinion. The Court of Appeals accepted the questions for review under 28 U.S.C. § 1292(b). Although the District Court invited both parties to submit all "controlling questions" of law for certification (R. 97), the employees did not elect to appeal the adverse ruling on remunerability of land travel or to submit alternative controlling questions of law that would be dispositive of petitioners' claim to compensation for travel over water.

The Court of Appeals reversed on the ground that Section 606 of the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. § 946, which expressly authorizes the Panama Canal Company to fix the compensation of its vessel employees in accordance with the wage practices of the maritime industry, is controlling as specific legislation and takes precedence over the general terms of the Thomas Amendment, which is applicable to federal employees in a category described as "the several trades and occupations, [the compensation for] which is set by wage boards or other wage-fixing authorities." The appellate court did not find it necessary to decide whether this travel time over water is "hours of labor" as claimed. Assuming *arguendo* that it is, the court held that a repugnancy exists between the Thomas Amendment and Section 606 in view of the finding that it is not the practice in the maritime industry to compensate vessel employees for such travel to and from their

duty stations. The conflict was resolved in favor of the express authority granted to the respondent under Section 606. (Pet. 16-17)

After judgment was entered by the Court of Appeals on January 9, 1963, the employees filed petition for rehearing *en banc* in which they urged for the first time the issue of a right to travel-time compensation under Section 248 of Title 2, Canal Zone Code (1934) which right was said to be independent of claimed entitlement under the Thomas Amendment (Appellees' Petition for Rehearing, p. 2). The Court of Appeals denied the petition for rehearing on February 11, 1963 (Pet. 22).

ARGUMENT

It is respectfully submitted that review by this Court is unwarranted. There is no important federal question involved here. The decision in question applies to only a limited area of federal employment, and, as to that, makes no change in long-established wage practices. It has no relation or application to the field of private employment at all, except in the sense that it approves respondent's administrative action under Section 606 of adopting for its vessel employees the pay practices of the private maritime industry.

There is no conflict with decisions of this Court, and the particular issue has not been before any other court of appeals.

The opinion of the court below is well reasoned; it construes Section 606 and the Thomas Amendment in a manner which gives effect to the specific purpose intended by the Congress and confirms the contemporaneous administrative construction of the law that has been applied consistently by the respondent agency for more than seventeen years.

The separate claim of a statutory right to travel pay that is independent of the Thomas Amendment was not

timely asserted and, in any event, is clearly without merit.

No different result would be reached in this case, even if the rationale of the Court of Appeals were in any respect deficient, because the decision is fully sustainable on independent grounds.

1. *There is no important question of federal law.*—The narrow issue here affects 171 men who work outside the continental United States as officers, operators or members of the crew of dredges and other vessels operated by the Panama Canal Company, a federal corporation (R. 61-65). The petition states that the question deserves review because of its general impact upon the 40-hour workweek ("our national labor policy") and because large numbers of employees will be deprived of a right under the Thomas Amendment to receive compensation at the rate of time and one-half for work in excess of 40 hours per week (Pet. 4, 5). Respondent submits that on the basis of this record and existing law such results cannot reasonably be said to flow from the decision of the Court of Appeals.

In the first place, the Thomas Amendment and Section 606 apply only to personnel of the federal government and, in the case of the latter statute, to only a specified category (vessel employees) in four federal agencies, including the Panama Canal Company. Since neither law has any application to non-Government employment, the decision could not have any effect on conditions in private industry one way or the other. To the contrary, in confirming respondent's right under Section 606 to apply wage practices of the corresponding segment of the private maritime industry, the decision effectively extends the national maritime labor policy to Government employees in maritime work. This fully conforms with manifest Congressional intent.

The 40-hour workweek is not generally recognized or required by law in the maritime industry. Congressional policy in this regard is apparent from the fact that the

maximum-hours provision of the Fair Labor Standards Act of 1938 has never been made applicable to persons employed as seamen.[5] Similarly, the maritime worker when employed by a contractor or subcontractor on a public work of the United States is expressly excluded from the maximum-hour limitations of the Contract Work Hours Standards Act.[6] Since Congress has not seen fit to extend to the maritime industry the 40-hour workweek that is prescribed for many types of employment ashore, petitioners are arguing, in effect, that the decision will deprive "many employees" of a right not granted by statute. This is a matter for the Congress rather than the courts.

On the other hand, where the wage practice in a particular portion or segment of the maritime industry is to fix a 40-hour week, as is the case in the dredging industry here involved, the ruling in the case at bar will support its continued application to vessel employees who are subject to Section 606.

The petitioners predict that the ruling of the lower court will have widespread effect in limiting use of the 40-hour week. That result does not even obtain with respect to them as litigants. The record shows that they do have a regularly-scheduled, 40-hour workweek and are compensated for overtime at the rate of time and one-half (Finding 25, R. 75). This corresponds to the practice of commercial dredging companies in the maritime industry (Finding 7(f), R. 90). Thus, the decision of the lower court does not have any effect on the pre-

[5] Fair Labor Standards Act of 1938, § 13(b)(6), 52 Stat. 1067, as amended, 29 U.S.C. § 213(b)(6) (Supp. IV, 1963).

[6] "... for purposes of this Act, laborers and mechanics shall include workmen performing services in connection with dredging or rock excavation in any river or harbor of the United States or of any territory or of the District of Columbia, *but shall not* include any employee employed as a seaman." (Emphasis added.) Act of August 13, 1962, § 103(a), 76 Stat. 358.

scribed length of their workweek at all. It only means that the travel to and from their duty stations on the vessel will continue to be performed on their own time, as is also the case with their counterparts working for private employers.

There is nothing in the record of this case to show how many federal vessel employees, other than petitioners, are subject to Section 606. Indeed, it appears as a matter of law that Section 606 has little or no application to vessel employees other than those of the Panama Canal Company, for the reason that as to the other enumerated agencies Section 606 must now be read in the light of Section 202(8) of the Classification Act of 1949, 5 U.S.C. § 1082(8), which affirmatively provides that the compensation of officers and members of crews of vessels ". . . shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry. . . ." 30 Comp. Gen. 158, 161-62 (1950).

Unlike the Panama Canal Company (which is excluded from the Classification Act of 1949 by Section 202(20), 5 U.S.C. § 1082(20)), the other agencies enumerated in Section 606 are not excluded from the Classification Act of 1949 and hence application of Section 606 to those agencies would appear to be superseded by the affirmative provisions of Section 202(8) of the Classification Act except to the extent that the term "vessel employees" in the former section may be somewhat more comprehensive than the term "officers or members of crews of vessels" in the latter section. Thus, for practical purposes the decision in the case at bar construing the effect of Section 606 affects only vessel employees of the Panama Canal Company.

However, even assuming *arguendo* that the decision

might theoretically affect a limited number of vessel employees of the other agencies enumerated in Section 606, respondent submits that the evident purpose of the law and the way it has here been shown to have been applied (i.e., to conform Government-agency practices for vessel employees to those followed in the private maritime industry) negate the assertion that the decision will have an adverse effect, regardless of the numerical scope of its application. In the light of that, and since it is a matter involving internal agency management in the executive branch, a field which the courts ordinarily consider immune from, or subject to only limited, judicial review, the instant case does not present an important question of federal law that would justify review on certiorari.

2. *There is no conflict with decisions of this Court.*—The petition states that the decision in the instant case is in conflict with the ruling of this Court in *United States v. Townsley*,[7] 323 U.S. 557 (1945). That contention does not survive analysis because: (a) Section 606, to which the Court of Appeals gave precedence over the Thomas Amendment, is a specific statute which was enacted at least five months after *Townsley* was decided in January 1945, and (b) the legal status of dredgemen on the Panama Canal, who then worked for the noncorporate Canal agency, changed materially on July 1, 1951 when they became vessel employees of the respondent Panama Canal Company.

In the *Townsley* case, this Court decided that the Governor of the Panama Canal acted as a wage-fixing

[7] The question of compensability of travel time was not raised in that suit although it is apparent that the same type of travel was then being performed without pay (Findings 4, 25, 3; R. 62, 75, 86). Thus, the end result (denial of pay for travel time) in the instant case would not be in conflict with the *Townsley* decision even if petitioners were otherwise subject to the Thomas Amendment.

authority within the meaning of the Thomas Amendment when he established (by reference to prevailing rates in the United States) the salaries of certain employees on floating equipment operated by the noncorporate agency known as The Panama Canal [now called Canal Zone Government]. It was held that such employees, who were paid on a monthly basis, were entitled to a 40-hour workweek and the overtime benefits of the Thomas Amendment even though theretofore only hourly and weekly employees were considered to come within its scope. The relevant points regarding the decision are that it dealt with the *noncorporate* Canal agency, rather than the respondent corporation, and that the Court did not then have before it the legislation, subsequently enacted, that prescribed special wage treatment for vessel employees in certain designated federal agencies.

In June 1945 Congress passed the Federal Employees Pay Act[8] providing a comprehensive plan of premium compensation (overtime, night differential, holiday pay, etc.) for Government workers generally. Sections 102(d) and 606 of the Act provided that no part of this statutory plan should apply to vessel employees of the Army Transportation Corps, the Coast and Geodetic Survey, and the Panama Railroad Company [respondent's earlier corporate name]. As to those employees, the Act authorized them "to be compensated in accordance with the wage practices of the maritime industry."

In 1946 Sections 102(d) and 606 were amended[9] to place vessel employees of the Department of the Interior on the same footing with those of the Army Transportation Corps, the Coast and Geodetic Survey and the Panama Railroad Company.

The legislative history of the 1945 Pay Act and the

[8]Act of June 30, 1945, 59 Stat. 295, 5 U.S.C. §§ 901-48.
[9]Act of May 24, 1946, § 8, 60 Stat. 218.

1946 amendment to Sections 102(d) and 606 thereof clearly shows that it was the intention of Congress that this special class of employees in the four agencies should be subject to a policy whereby the wages and pay practices of the maritime industry would be used as a basis for fixing their compensation.[10] The same history also shows that, in enacting the 1945 Pay Act, the Congress was not only aware of the *Townsley* decision of this Court, but wished to affirmatively enact the judicial construction of the Thomas Amendment that it contained.[11] Section 203 [later designated 205] of the Act provided that wage-board employees whose basic compensation was fixed on an annual or monthly basis and adjusted in accordance with prevailing rates would be entitled to receive overtime in accordance with the Thomas Amendment. The exclusion of vessel employees, by Sections 102(d) and 606, from a statutory scheme of premium compensation which included the enactment of the *Townsley* rule, is clear indication that Congress considered vessel employees as a group distinct from wage-board employees and one to which the wage practices of the private maritime industry, as distinguished from the Government practices then being prescribed, should apply.

Petitioners' reliance on a "savings clause" appearing in the 1958 statute[12] which established a merit and wage system for the Canal Zone, is misplaced. That clause merely preserved the applicability of the Thomas Amendment for those employees within its coverage and had no positive effect toward extension of the 1934 Act.

The record shows that on July 1, 1951, pursuant to

[10] H.R. Rep. No. 726, 79th Cong., 1st Sess. 10, 21 (1945); H.R. Rep. No. 1834, 79th Cong., 2d Sess. 21 (1946).

[11] The portion of House Report No. 726 dealing with the *Townsley* rule and Section 203 of the Act is set out in the District Court's opinion in the instant case (R. 46-47).

[12] Act of July 25, 1958, § 47, 72 Stat. 411 (subsequently codified as 2 C.Z.C. § 156, 76A Stat. 20 (1962).

2 C.Z.C. § 256 (1934) (as added by Act of September 26, 1950, § 10, 64 Stat. 1042) and Executive Order 10263[11] of June 29, 1951, issued thereunder, there were transferred from the employ of the nonincorporate agency [now designated: Canal Zone Government] to the employ of the respondent Panama Canal Company a total of approximately 10,150 employees, including those of the 17 petitioners here who were on the rolls of the nonincorporate agency as of June 30, 1951. (Finding 4, R. 62). By virtue of this transfer the positions that petitioners occupy as officers, operators and members of crews were brought within the category of vessel employees of the Company. There was no provision in the 1950 Act or Executive Order that served to give these transferees a special status different from that of the employees the Company already had; therefore, they became subject to the existing laws regulating the affairs of the corporation and, more specifically, to the terms of Sections 102(d) and 606.

In the light of these circumstances it is plain that the opinion of the Court of Appeals is not in conflict with the *Townsley* decision of this Court, the only one relied upon by petitioners to show such conflict.

3. *The decision below is clearly correct.*—The Court of Appeals held (i) that petitioners are vessel employees within the meaning of Sections 102(d) and 606, (ii) that assuming, without deciding, that travel time is hours of labor under the Thomas Amendment) there is a repugnancy between Section 606 and the Thomas Amendment, and (iii) that Section 606 is a specific statute that must take precedence over the Thomas Amendment. Treating these points in order, it is to be noted first that there is no dispute as to the fact that petitioners are officers, operators or members of the crews of dredges and other vessels operated by the respondent on navigable waters of the Canal Zone (R. 36, 61-65).

[11] 3 CFR, 1949-53 Compilation, p. 764

The District Court considered that, as a factual matter, they are vessel employees, but concluded that they are not vessel employees covered by Sections 102(d) and 606. The reason stated by the trial court was that in 1945, when these two sections were enacted, petitioners were not employed by the corporation and so the "Congress in passing specific legislation for 'vessel employees' of the Company could not have had them in mind". (R. 48). The Court of Appeals disagreed because it was of the opinion that Congress could not have intended the wage treatment for the agency's vessel employees *inter se* to be different depending upon whether the Company's employment of them antedated or postdated enactment of Section 606 (Pet. 47). This accords with the principle that a statute that is prospective in operation will apply to persons, subjects, and businesses within its purview and scope, although coming into existence after its passage, where the language fairly includes them. *Cain* v. *Bowlby*, 114 F. 2d 519, 522 (10th Cir. 1940), *cert. denied*, 311 U.S. 710 (1940); *De Lima* v. *Bidwell*, 182 U.S. 1, 197 (1901); *Gaiser* v. *Buck*, 203 Ind. 9, 179 N.E. 4 (1932).

The appellate court noted the anomaly that would result if the Company were required to apply different wage-fixing rules among its vessel employees, dependent upon whether the particular workman had been hired before or after the passage of Section 606.[14] As has already been noted,

[14] The petition calls attention to the fact that the name of the corporation referred to in Section 606, when enacted in 1945, was the "Panama Railroad Company". It argues that petitioners have never worked for an agency with that name and states that the respondent did not attain its corporate existence until 1950.

The correct version of the matter was stipulated by the parties and adopted in the findings of the District Court (R. 61). This shows that the Company, although wholly owned by the United States from 1905, continued under its New York charter until 1948, at which time it was re-incorporated under federal law under the same name. 2 C.Z.C. §§ 245-58 (1934), as added by Act of June 29, 1948, 62 Stat. 1076, effective July 1, 1951, upon transfer to the respondent of the responsibility

the committee reports on this legislation suggested no limitation whatsoever on the authority to apply wage practices vested in the agency by the clear language of the statute.

Assuming *arguendo* that the claimed travel pay would be due petitioners under the Thomas Amendment, the Court of Appeals correctly (and necessarily) found that there was a conflict between such a result and the maritime practice—shown to be that of treating such travel as noncompensable. This conflict demonstrated the repugnancy between the Thomas Amendment and Section 606. (Pet. 16)

Petitioners' easy answer for resolving the incompatibility between the two statutes is: Give us the greater benefit provided by either one; therefore, if travel pay is not a maritime wage practice, the 40-hour workweek standard of the Thomas Amendment should be construed to require that such compensation be paid to us. Such a position ignores the plain direction of the Congress to the effect that maritime industry wage practices are to be applied in federal employment to the precise worker category of which petitioners are undeniably a part.

The Court of Appeals, having found no means of harmonizing the two enactments so as to give effect to both, ruled that the specific terms of Section 606 control. The decision was correct under the well-settled principle

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for operation of the Panama Canal, the respondent's name became "Panama Canal Company", pursuant to Section 2(a)(2) of the Act of September 26, 1950, 64 Stat. 1041. The said section provided that the term "the Panama Railroad Company", wherever appearing in the statutes of the United States and having reference, prospectively, to the corporation thereafter known by that name, was amended to read "the Panama Canal Company".

Sections 102(d) and 606, as amended, clearly cover the vessel employees of the Panama Canal Company and the scope of the corporate powers contained in Section 249 of Title 2, Canal Zone Code (1934) (*Supra*, p. 5), shows that respondent's vessel employees were not expected to be limited to a single category or type of vessel.

of statutory construction that specific terms covering a given subject matter will prevail over the general language of the same or another statute which might otherwise prove controlling. *Baltimore National Bank* v. *State Tax Com'r*, 297 U.S. 209 (1936); *Bulova Watch Co.* v. *United States*, 365 U.S. 753 (1961). Clearly the Thomas Amendment is general in nature, covering employees in various trades and occupations in many unrelated industries. On the other hand, the term "vessel employees" identifies a distinct group in a particular industry which, in pay and labor legislation, has almost invariably been treated separately from groups in other industries.

On this point petitioners argue variously that the Thomas Amendment is more specific than Section 606, or that giving effect to the latter statute would constitute an implied repeal of the first. Here the employees rely in part upon *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). That case held that the general provision of the Taft-Hartley Act providing for suits between employers and employees arising out of labor contracts did not repeal an earlier specific prohibition against injunctions contained in the Norris-LaGuardia Act. The result obtaining there is fully consistent with the respondent's position here, namely, in affirming the controlling effect to be given a specific statute over a law of a general nature even where such general statute is enacted later. In the instant case, of course, the specific statute, Section 606, was passed after enactment of the general law.

The result reached was also proper because it carries out the express intention of the Congress. There is no doubt that the policy of the laws was, and is, to give maritime workers in the four Government agencies named (including the Panama Canal Company) the same compensation, both basic and premium, that they would receive in comparable jobs in private industry. This is confirmed by the fact that in 1949, after Section 606 had

been in effect for more than four years, Congress extended the plan to officers and members of crews of vessels throughout the federal service.[15] As this Court said in *Atkinson*: "Where congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent." 370 U.S., at 215.

4. *Petitioners' reliance upon 2 C.Z. Code § 248 (1934) is without substance and, in any event, presents an issue not raised in the court below.*—The third question presented by the petition is phrased in terms of a query whether the Court of Appeals should have remanded the case to the District Court to determine whether the employees are entitled to the claimed compensation for travel time under Section 248[16] of Title 2, Canal Zone Code, as a matter of right arising independently without regard to the Thomas Amendment. In essence, the question actually is:

> Whether petitioners have a statutory right to the travel time sought by them under Section 248 of Title 2 Canal Zone Code (1934), which simply, in effect, authorizes the respondent to appoint its employees, define their authority and duties, and fix their compensation.

The foregoing raises a purely legal issue which could be decided without the necessity of a remand if the case were accepted by this Court for review. However, respondent contends that the asserted right is so completely devoid of both substance and merit that further consideration of it would be unwarranted. Section 248(e) contains the statement of one of the general powers bestowed upon the corporation; it is the power relating to employees and their compensation. It provides that the Panama Canal Company may

[15] Classification Act of 1949, § 202(8), 63 Stat. 955, 5 U.S.C. § 1082(8).

[16] As added by Act of June 29, 1948, c. 707, § 2, 62 Stat. 1076, and amended September 26, 1950, c. 1049, § 8, 64 Stat. 1041. The pertinent portions of § 248 are set out in this brief at p. 5.

> "appoint such officers, agents, attorneys, and employees as may be necessary for the conduct of the business of the corporation, define their authority and duties, fix their compensation, delegate to them such of the powers of the corporation as may be necessary, require that such of them as it may designate be bonded, and fix the penalties and pay the premiums of such bonds."

This subsection vests full authority in the corporation to appoint employees such as the petitioners, to assign them to duty, and to fix their compensation.

There is nothing in such a grant of authority that prescribes the manner in which the discretion should be exercised; it vests no affirmative rights in the employees appointed thereunder and so provides not the slightest support for the petitioners' travel-time claim. On the contrary, the exercise of this general corporate power by respondent is wholly consistent with the concomitant use of Section 606 in fixing the compensation of petitioners and other vessel employees of the Company.

If the question *were* one of possible merit, it should still not be reviewed on certiorari because it was not timely urged below. Although Section 248 was pleaded in the complaints (R. 5, 8), the District Judge did not find in it any support for petitioners' claim (R. 54, 57). It was the application of the Thomas Amendment, and not Section 248, that was the basis of the trial court's ruling in favor of petitioners. In discussing the point, petitioners do not suggest how the alleged entitlement to travel-time pay could arise from Section 248. They merely state that the question was not certified to the Court of Appeals under 28 U.S.C. § 1292(b) as were the questions involving the Thomas Amendment. That deficiency was of their own making, because on June 14, 1961, when respondent's motion for certification of two questions was heard, the court expressed a desire to certify all controlling questions

of law in the case and gave the parties until June 23, 1961 to submit them (R. 97). None was offered or certified on behalf of petitioners.

In their brief in the Court of Appeals, petitioners cited Section 248 only for the limited purpose of arguing that they must be regarded as employees of the United States and, as such, subject to the provisions of the Thomas Amendment. (Brief for Appellees, p. 28)

It was not until after judgment had been entered in the appellate court that petitioners advanced the idea of an independent statutory right to travel pay arising out of Section 248. In asking the Court of Appeals to rehear the case *en banc*,[1] the petitioners asserted that it had "erroneously failed to remand the case for further consideration of the validity of appellees' claims under Section 248 of Title 2, Canal Zone Code, as amended, to which the District Court had held appellees subject." As they have done here, petitioners refrained from stating why they felt there was such a statutory right to travel-time pay independent of the Thomas Amendment. The argument was limited to a suggestion that there should be further consideration of the matter in the trial court (Appellee's Petition for Rehearing and Brief in Support of Petition, pp. 2-10).

In view of the fact that this point was not timely raised and briefed in the court below and was not considered there, it should not be reviewed here. *California* v. *Taylor*, 353 U.S. 553, 557, n. 2 (1957); *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16 (1958); *Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955).

3. *The decision is sustainable on other grounds urged by respondent in the court below.*—Respondent submits that the result reached by the Court of Appeals would have

[1] Rule 25a, U.S. Court of Appeals for the Fifth Circuit, 28 U.S.C.A. (Supp. 1962, p. 57).

been the same even if the Thomas Amendment had been found to be applicable. If the writ of certiorari were granted, the Panama Canal Company would be prepared to show that the time spent by petitioners in travel to and from work does not constitute *hours of labor* for which compensation must be paid. It has been noted that the District Court held the portion of the employees' travel performed overland *is not work*, whereas the remainder of the journey over water *is working time*. Respondent contends that, absent an abuse of administrative discretion which cannot be shown here, such determinations lie within the area of agency management and personnel [18] and are matters entrusted to the discretion of the executive branch rather than to the judiciary. The courts have consistently refrained from invading territory that is inherently legislative or executive. *Field* v. *Giegengack*, 73 F. 2d 945, 947 (D.C. Cir. 1934).[19]

It is readily demonstrable that the Company's determination regarding nonremunerability of travel time is supported by substantial evidence and would be upheld upon review. Assuming *arguendo* that the petitioners are entitled to full judicial review, travel time spent upon waterborne conveyances does not constitute hours of labor within the meaning of the Thomas Amendment under the stated facts found by the District Court. The only decided cases that appear to have treated the question of travel over water hold that, under both Section 201 of the Federal Employees Pay Act of 1945 and the Fair Labor Standards Act, such time is *not compensable*. *Alhearn* v. *United States*, 142 Ct. Cl. 309 (1958); *Bulot* v. *Freeport Sulphur Co.*, 45 F.

[18] Section 4 of the Administrative Procedure Act expressly excludes from rule-making those matters relating to "agency management or personnel," and Section 10 of the Act provides that there shall be no review of action that "is by law committed to agency discretion." 60 Stat. 238, 243 (1946), 5 U.S.C. §§ 1003, 1009.

[19] See also *Panama Canal Company* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958).

Supp. 380 (E.D. La. 1942); *West* v. *Texas Co.*, 65 F. Supp. 97 (E.D. La., 1946).

Respondent would also be prepared to show that the decision below is correct because the Thomas Amendment does not apply to the petitioners irrespective of the effect of Section 606. This follows from the fact that petitioners are paid on an hourly basis. The Thomas Amendment was extended for the first time to Government corporations by Section 205 of the Federal Employees Pay Act of 1945, but such extension was limited to per annum and monthly employees. Since prior to 1945 the Amendment did not cover any workers of corporate agencies, after the enactment of Section 205 the hourly employees such as petitioners remained outside the coverage of the 1934 enactment.

Finally with respect to the 133 petitioners whose positions have been designated as *local-rate* because the compensation has been based upon local prevailing pay rates, it would be shown that none of this group is classifiable as a wage-board employee and, therefore, none of them is subject to the Thomas Amendment. This conclusion is based upon the well-defined pattern of Federal statutes which uniformly treat them as separate from the wage-board groups whose compensation is fixed on the basis of prevailing rates in the continental United States, and as therefore outside the scope of the Thomas Amendment. It is also confirmed by long-standing administrative construction of the law by the Comptroller General of the United States and the Panama Canal agencies concerned.

It is submitted that the decision of the Court of Appeals can be readily supported on the alternative grounds which were acknowledged by the court but which it was not required to decide (Pet. 17).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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